

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION**

IN RE ASHLEY MADISON CUSTOMER  
DATA SECURITY BREACH LITIGATION

This Document Relates to:

## ALL CASES

MDL No. 2669

Case No. 4:15MD2669 JAR

**SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR APPOINTMENT  
OF PLAINTIFFS' INTERIM LIAISON COUNSEL, INTERIM CO-LEAD COUNSEL,  
AND INTERIM EXECUTIVE COMMITTEE**

At the initial status conference held on January 26, 2016, the Court invited Plaintiffs' counsel to file any additional submissions relating to Plaintiffs' leadership structure and the creation of a Common Benefit Fund. In response to the Court's request, movants have modified the proposed leadership structure described in the Plaintiffs' working group's Amended Motion for Appointment of Plaintiffs' Interim Liaison Counsel, Interim Co-Lead Counsel, and Interim Executive Committee (Doc. 66), by adding two additional members to Plaintiffs' proposed Interim Executive Committee. Movants also respectfully submit their proposal for a Common Benefit Fund, which is further detailed in the Proposed Order submitted herewith.

**A. REQUEST TO APPOINT ADDITIONAL MEMBERS TO PROPOSED INTERIM EXECUTIVE COMMITTEE.**

During the initial status conference, the Court indicated that it was unwilling at this time to create a dual plaintiffs' counsel structure with separate liaison, lead and executive committees. The Court further suggested that it intended to appoint a structure of liaison counsel, co-lead counsel and a Plaintiffs' executive/steering committee, consisting of either five or seven firms, to represent Plaintiffs and the putative Class. The Court also indicated that the proposed executive

committee should contain varying perspectives regarding the litigation of this case to ensure appropriate representation of the interests of Class members.

As set forth in movant's Amended Motion for Appointment of Plaintiffs' Interim Liaison Counsel, Interim Co-Lead Counsel, and Interim Executive Committee (Doc. 66), movants have proposed that this Court appoint Douglas P. Dowd and Dowd & Dowd, P.C. as Plaintiffs' Interim Liaison Counsel and appoint John J. Driscoll and The Driscoll Firm, P.C. and W. Lewis Garrison, Jr. and Heninger Garrison Davis, LLC as Plaintiffs' Interim Co-Lead Counsel. In addition, movants have requested that the Court appoint a Plaintiffs' Interim Executive Committee comprised of five attorneys and law firms: John Arthur Eaves, Jr. of the Eaves Law Firm; Christopher S. Hinton of The Rosen Law Firm, P.A; Gary F. Lynch of Carlson Lynch Sweet & Kilpela, LLP; J. Parker Yates of Baddley & Mauro, LLC, and William B. Federman of Federman & Sherwood. These attorneys represent plaintiffs in 10 of the 20 actions that have been transferred to these proceedings, and already constitute a broad selection with varying strengths and differing perspectives.<sup>1</sup>

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<sup>1</sup> The Siprut PC firm filed a Response to the initial Motion for Appointment contending that the proposed leadership structure has no "data breach experience at all." See Doc. 43. Movants are at a loss to explain this representation, given the materials that were attached in support of counsel's Motion for Appointment. In any event, as set forth in the Amended Motion for Appointment of Plaintiffs' Interim Liaison Counsel, Interim Co-Lead Counsel, and Interim Executive Committee, and the materials submitted therewith, proposed Interim Co-Lead Counsel and several members of the proposed Interim Executive Committee are experienced data breach litigators. See Doc. 66.

However, in order to further address any concern the Court may have that the Executive Committee be as representative as possible, movants have added two additional counsel to their proposed Interim Executive Committee: (1) Thomas A. Zimmerman, Jr. and the Zimmerman Law Offices, P.C.; and (2) Julian Hammond and HammondLaw, P.C. Following the status hearing, Mr. Zimmerman and Mr. Hammond contacted movants, indicating their willingness and ability to cooperate with the proposed Plaintiffs' leadership structure set forth in movants' Amended Motion for Appointment.

In addition to being experienced attorneys well-versed in prosecuting complex class actions, these additional lawyers can offer different perspectives on issues that have been raised in this litigation. For example, and as set forth below, Mr. Zimmerman and his firm bring a unique perspective as they are the only counsel in this case who have decided to name as defendants and bring claims against Defendants' prior counsel, Barnes & Thornburg, LLP. Similarly, Mr. Hammond represents Plaintiffs in an action transferred from the Central District of California, *John Doe I et al. v. Avid Life Media, Inc. et al*, Case No. 2:15-cv-06405 (C.D. Cal.). While Mr. Mason has alleged that he was the first attorney to bring "Fembot" fraud claims, see Doc. 59 at 7, Mr. Hammond filed an Amended Complaint the same day, September 11, 2015, raising fraud allegations based on these same facts. *See Id.*, Doc. 17.<sup>2</sup>

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<sup>2</sup> As the JPML pointed out, numerous cases among the consolidated actions have made these claims. For example, the First Amended Class Action Complaint submitted in the original Ashley Madison case filed in this Court also seeks recovery for these "Fembot fraud" allegations, and is the only complaint to allege a nationwide RICO conspiracy based on these facts. *See Jane Doe et al. v. Avid Life Media Inc. et al.*, No. 4:15-cv-01132 JAR (E.D.Mo.), Doc. 19-1.

As such, the Zimmerman and Hammond Firms bring additional perspectives and points of view to representing the interests of the consumer Class. Furthermore, and unlike some other counsel who have submitted applications in this matter, these firms have demonstrated that they can work well and in a productive manner with the other members of Plaintiffs' working group in litigating these complex claims. Finally, the combined Plaintiffs' Interim Liaison Counsel, Interim Co-Lead Counsel, and Interim Executive Committee proposed herein represent three of the plaintiffs with lawsuits that are currently proceeding under their own (non-fictitious) names,<sup>3</sup> and they also represent additional plaintiffs that are willing to proceed under non-fictitious names should this be required by the Court.

**1. Thomas A. Zimmerman, Jr. and the Zimmerman Law Offices, P.C.**

Thomas A. Zimmerman, Jr. has significant experience leading the prosecution of complex class actions, including more than fifteen (15) privacy violation and consumer fraud class actions. His law firm consists of six attorneys located in Chicago, who practice extensively and have recovered over \$200 million in class action, corporate, commercial, consumer fraud, general civil, product liability, toxic tort, and other complex litigation. *See Zimmerman Law Offices, P.C. Firm Bio*, attached as Exhibit 1.

With almost twenty (20) years of experience, numerous state and federal courts have recognized Mr. Zimmerman's leadership and knowledge, and appointed him as lead or co-lead counsel in complex class actions across the country, including: *Fraud*: \$62 million recovery for a nationwide class of customers who purchased products that were advertised to reduce cellulite in

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<sup>3</sup> *Alfaro v. Avid Life Media, Inc. and Avid Dating Life, Inc.*, No. 4:15-cv-01930 (E. D. Mo.);

*Lisuzzo v. Avid Life Media, Inc. and Avid Life Dating, Inc.*, No. 4:15-cv-01945 (E.D. Mo.); and

*DeLoach v. Avid Life Media, Inc. and Avid Life Dating, Inc.*, No. 4:15-cv-01925 (E.D. Mo.).

the human body, plus equitable relief to correct the misleading claims. *Joseph v. Beiersdorf North America, Inc.*, No. 11 CH 20147 (Cook Cnty, Ill.); Privacy Violation: \$7.3 million recovery for a nationwide class of consumers whose personal information was improperly disclosed. *Aliano v. Airgas USA, LLC*, No. 14 CH 20024 (Cook Cnty, Ill.); Fraud: \$3.5 million recovery for a nationwide class of Spanish speaking purchasers of baby formula, arising out of misleading product labeling. *Cardenas v. Mead Johnson & Company*, No. 01 CH 11151 (Cook Cnty, Ill.); Privacy Violation: \$1 million recovery for a nationwide class of consumers whose personal information was improperly disclosed. *Radaviciute v. Christian Audigier, Inc.*, No. 10 cv 8090 (N.D. Ill.).

Thus far, in the early stages of this litigation, Mr. Zimmerman and his firm performed significant pre-suit investigation, and have already moved for injunctive relief to force Defendants to take steps to seal the data breach in their system. They also named Defendants' former attorneys as defendants complicit in misleading male members of the *Ashley Madison* website into believing that fake female profiles with which they are interacting are in fact actual females' profiles. And they have already drafted critical discovery in this litigation, including written discovery requests, notices of deposition, and FOIA requests, and three (3) proffered pre-trial orders relative to discovery and ESI issues. See *Motion for Appointment of Thomas A. Zimmerman, Jr., as Interim Co-Lead Counsel*, and exhibits thereto, Docket No. 62.

In addition to appointing Mr. Zimmerman to serve on the Executive Committee, the moving parties also request that Mr. Zimmerman be appointed as the "back-up" Interim Co-Lead Counsel to substitute in the event that one of the Interim Co-Lead Counsel cannot serve due to representing a "Doe" Plaintiff or otherwise.<sup>4</sup>

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<sup>4</sup> A reference was made at the hearing on January 26, 2015 to the Driscoll Firm, P.C.

**2. Julian Hammond and HammondLaw, P.C.**

Julian Hammond is an attorney admitted to the bar of the State of California and the State of New York, and is founding shareholder of HammondLaw, P.C. HammondLaw, P.C. is dedicated to complex class action litigation including actions arising from the violations of the California Labor Code, Fair Labor Standards Act, and consumer protection statutes. The Firm has served as counsel to plaintiffs in numerous actions arising from the consumer protection statutes, including *Siciliano et al. v. Apple, Inc.*, Case No. 1-13-cv-257676 (Cal. Sup. Ct. Santa Clara Cty.) (lead counsel in Automatic Renewal Law (ARL) class action brought on behalf of subscribers to Apple's In App subscriptions); *Kruger v. Hulu, L.L.C.*, Case No. BC540053 (Cal. Sup. Ct. L.A. Cty.) (lead counsel in ARL class action brought on behalf of subscribers to Apple's in-app subscriptions); *Savetsky v. Pre-Paid Legal Services, Inc. dba LegalShield*, Case No. 3:14-cv-03514 SC (N.D. Cal.); (lead counsel in ARL class action brought on behalf of subscribers to LegalShield's legal services and identity protection plans); *Mayron v. Google, Inc.*, Case No. 1-15-cv-275940 (Cal. Sup. Ct. Santa Clara Cty.) (co-lead counsel with Berman DeValerio in an ARL class action brought on behalf of subscribers to Google's Google Drive storage plan); and *Goldman v. LifeLock, Inc.* Case No. 1-15-cv-276235 (Cal. Sup. Ct. Santa Clara Cty.) (co-lead counsel with Berman DeValerio in an ARL class action brought on behalf of subscribers to Lifelock's identity protection programs).

Mr. Hammond has focused on class action litigation, and more specifically, consumer class action and labor litigation since becoming a member of the plaintiffs' bar in 2008. See

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representing only "Doe" Plaintiffs. As counsel has previously informed Mr. Mason, the Driscoll Firm, P.C. also represents clients who would be willing to serve in their own names, in the event that the Court ultimately denies Plaintiffs' Motion to Proceed Under Pseudonyms.

Exhibit 2, Resume of Julian A. Hammond, attached hereto. During this time, he has served as counsel to plaintiffs in numerous actions arising from the breach of consumer databases and the violation of consumer protection statutes. HammondLaw, P.C. has also served as lead and co-lead counsel to plaintiffs in numerous class actions arising from the violation of the California Labor Code and consumer protection statutes.

## **II. REQUEST TO ESTABLISH A COMMON BENEFIT FUND.**

In order to provide for the fair and equitable sharing among plaintiffs and their counsel of the burden of services performed and expenses incurred for the common benefit of all plaintiffs in this complex litigation, movants request that the Court establish a Common Benefit Trust Fund at a national bank in the name of and to be maintained by Interim Co-Lead Counsel, as detailed in the Proposed Order submitted herewith. The purpose of this Fund will be to hold funds to compensate attorneys for services rendered for the plaintiffs' common benefit and to reimburse them for expenses incurred in conjunction with those common benefit services.

This Court's authority to establish such a fund derives from the United States Supreme Court's common benefit doctrine, as established in *Trustees v. Greenough*, 105 U.S. 527 (1881); refined in, *inter alia*, *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885); *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980); and approved and implemented in the MDL context, in *inter alia*, *In re Air Crash Disaster at Florida Everglades on December 29, 1972*, 549 F.2d 1006, 1019-21 (5th Cir. 1977); and *In re MGM Grand Hotel Fire Litigation*, 660 F.Supp. 522, 525-29 (D. Nev. 1987). See also *Manual for Complex Litigation (Fourth)* § 20.312 ("MDL judges generally issue orders directing that defendants who settle MDL-related cases contribute a fixed percentage of the settlement to a general fund to pay national counsel.").

The doctrine has been adopted by the Eighth Circuit and is the standard procedure by

which this Court compensates leadership attorneys for their work in providing a common benefit. *In re Genetically Modified Rice Litig.*, No. 4:06-MD-1811-CDP, 2010 WL 716190, at \*4 (E.D. Mo. Feb. 24, 2010), *aff'd* 764 F.3d 864 (8th Cir. 2014). See also *Walitalo v. Iacocca*, 968 F.2d 741, 747 (8th Cir. 1992); *In re NuvaRing Products Liab. Litig.*, No. 4:08-MDL-1964 RWS, 2014 WL 7271959, at \*2 (E.D. Mo. Dec. 18, 2014) (applying the doctrine). Common benefit work product includes all work performed for the benefit of all plaintiffs, including pre-trial matters, discovery, trial preparation, any potential settlement process, and all other work that advances this litigation to conclusion.

Under this proposal, Defendants shall hold back and set aside for placement into Interim Co-Lead Counsel's Common Benefit Trust Fund the following amounts related to each Action: (i) eight percent (8%) of any gross recovery obtained by any plaintiff, by way of judgment, settlement, or otherwise, for attorneys' fees; and (ii) an additional three percent (3%) of any gross recovery obtained by any plaintiff by way of judgment, settlement, or otherwise, for common benefit costs and expenses incurred by attorneys providing a common benefit.

Additionally, movants propose that Plaintiffs' Interim Co-Lead Counsel, after appropriate consultation and with the advice and consent of Plaintiffs' Interim Executive Committee and Interim Liaison Counsel, shall assess the amounts necessary for common litigation costs required for the efficient and effective prosecution of the litigation and shall collect and maintain assessments from themselves, Plaintiffs Interim Liaison Counsel, and the Interim Executive Committee. Each firm that is a member of the Plaintiffs' Interim Co-Lead Counsel, Interim Liaison Counsel, and Interim Executive Committee shall contribute amounts sufficient to cover Plaintiffs' expenses for the administration of the MDL. Said assessments shall be held in an



Ashley Madison MDL Operating Expense Fund (“MDL Fund”) established and administered by Plaintiffs’ Interim Co-Lead Counsel.

Additional provisions of the proposed Common Benefit Fund and proposed Ashley Madison MDL Operating Expense Fund are detailed in the attached Proposed Order.

WHEREFORE, pursuant to Rule 23(g) of the Federal Rules of Civil Procedure, movants respectfully request that the Court (1) appoint Douglas P. Dowd and Dowd & Dowd, P.C. as Plaintiffs’ Interim Liaison Counsel; John J. Driscoll and The Driscoll Firm, P.C., and W. Lewis Garrison, Jr., and Heninger Garrison Davis, LLC, as Plaintiffs’ Interim Co-Lead Counsel; and John Arthur Eaves, Jr., and the Eaves Law Firm; Christopher S. Hinton and The Rosen Law Firm, P.A; Gary F. Lynch and Carlson Lynch Sweet & Kilpela, LLP; J. Parker Yates and Baddley & Mauro, LLC; William B. Federman and Federman & Sherwood; Julian Hammond and HammondLaw, P.C.; and Thomas A. Zimmerman, Jr., and Zimmerman Law Offices, P.C., as the members of Plaintiffs’ Interim Executive Committee; and (2) order the establishment of a Common Benefit Fund and an MDL Operating Expense Fund, as set forth in the Proposed Order filed herewith; and (3) for any other relief the Court deems just and proper, the premises considered.

Date: January 25, 2016

Respectfully Submitted,

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### **CERTIFICATE OF SERVICE**

I hereby certify that on February 1, 2016, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon all parties. In addition, copies were served via email upon the following attorneys of record:

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